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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Housing and Urban Development and the other federal defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-22a) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 24a-29a) is reported at 415 F. Supp. 550.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 23a) was entered on December 1, 1976. On February 22, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z-1(f)(3) required the Secretary of Housing and Urban Development to establish an operating subsidy program.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this petition (App. D, *infra*, pp. 30a-35a).

STATEMENT

1. Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (1970 ed. and Supp. V) 1715z-1, is designed to encourage private enterprise to develop rental and cooperative housing for lower income families. To this end, the statute provides for three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1

(f)(3)) programs.[1] The operating subsidy program would provide for periodic payments, on behalf of tenants who pay more than 25 percent of their income in rent, to the owner of a qualifying housing project to offset increases in utility charges and local property taxes. The effect of such payments would be to reduce the amount by which the tenants' rentals would otherwise have to be increased on account of such increased costs.

Like all other programs established under Section 236, the operating subsidy program would require the use of "contract authority". See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Congress first specifies the total dollar amount of contracts that may be undertaken for a given program ("authorized contract authority") and, by subsequent appropriation statutes, permits the Secretary to use specified amounts of that authorized contract authority ("released contract authority") for a given fiscal year or other specified period of time. From time to time thereafter, Congress appropriates the funds necessary to satisfy contractual obligations entered into pursuant to released contract authority ("the liquidation funds").[2] Congress has not ap-

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[1] The "interest-reduction" program provides assistance in paying the interest on a project mortgage, and the "deep subsidy" program permits very low income tenants to occupy units in a project by defraying their rental expense to the extent that it exceeds 25 percent of income.

[2] Appropriated funds are supplemented by a special revolving fund ("the reserve fund"), consisting of payments from project owners to the Secretary of amounts collected

propriated released contract authority for the Section 236 programs since 1972 (Pub. L. 92-383, 86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million.[3] It was estimated that operation of the deep subsidy program, which the Secretary was required to establish (12 U.S.C. (Supp. V) 1715z-1(f)(2)), would require the obligation of $50 million in that year alone. It was further estimated that the Secretary's commitments under the interest reduction program would require $74.8 million,[4] and that implementation of the operating subsidy program would cost an additional $53.7 million for that fiscal year. Thus the released contract authority was insufficient to cover both the outstanding commitments

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in excess of "basic rental charges." See 12 U.S.C. (Supp. V) 1715z-1(g). Prior to August 1976, this fund could be used only for payment of operating subsidies; now it may be used for other housing programs as well. Pub. L. 94-378, 90 Stat. 1095, 1096. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.

[3] The account given here of the Section 236 programs and related matters is set forth with supporting affidavits in the Secretary's application to this Court for a stay pending appeal in *Hills* v. *Underwood*, C.A. D.C., Nos. 76-1603 and 76-1650, which was granted on October 18, 1976. A copy of that stay application is being furnished to counsel for respondents.

[4] Although the interest reduction program was suspended in January 1973, outstanding commitments made prior to that suspension were estimated to require utilization of $74.8 million in contract authority for fiscal year 1976 alone.

under the interest reduction program and implementation of the operating subsidy program. The Secretary decided to honor the outstanding commitments and not to establish the operating subsidy program.

2. Respondents are tenants of the Meyler Park Apartments, a housing project in San Pedro, California, that receives interest-reduction assistance pursuant to Section 236. They commenced this suit in the United States District Court for the Central District of California, asking that the Secretary be ordered to establish and implement an operating subsidy program for the project and requesting payments of the subsidy retroactive to February 18, 1975 (the date on which they contended the program should have been instituted).[5] The district court certified a class comprised of all eligible Meyler Park tenants. The court held that establishment of an operating subsidy program was mandatory under Section 236, and it ordered the Secretary to establish and implement such a program for Meyler Park. The court

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[5] The statute fixes no date for the commencement of payments; it does provide that an initial operating expense level "shall be established" by February 18, 1975, for any project receiving interest-reduction assistance. 12 U.S.C. (Supp. V) 1715z-1(g). The initial operating expense level is defined as the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. 12 U.S.C. (Supp. V) 1715z-1(f)(3). The amount of interest-reduction assistance cannot exceed the amount by which, at the time of the most recently approved rent increase, utility charges and property taxes exceeded the project's initial operating expense level.

also ordered the Secretary to pay respondents benefits, equal to the amount their rentals would have been reduced on account of payment of the subsidy to the project owner, retroactive to February 18, 1975.

The court of appeals affirmed the award of retroactive benefits.[6] The court held that the Secretary abused her discretion in not establishing an operating subsidy program. The court reasoned that the Secretary could have made operating subsidy payments, in excess of the amount of released contract authority, from a special reserve fund (see note 2, *supra*) and therefore could have established and implemented all three Section 236 programs.[7]

REASONS FOR GRANTING THE PETITION

The case involves an important question of national housing policy that this Court should resolve. The same issue is raised in the government's peti-

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[6] As of July 1, 1976, respondents began receiving assistance under the so-called "Section 8 set-aside program" established pursuant to 42 U.S.C. (Supp. V) 1437f. See 24 C.F.R. 886. Under that program, respondents pay no more than 25 percent of their adjusted incomes toward rent. Since the operating subsidy program assists only tenants who pay rent equal to more than 25 percent of their incomes, the court of appeals concluded that respondents' request for prospective relief was moot (App. A, *infra*, p. 10a).

[7] Following the decision, the Secretary made payments for January 1, 1976, through June 30, 1976. Payments for 1975 were being calculated when, on February 10, 1977, the court of appeals recalled its mandate pending disposition of the case on petition for a writ of certiorari.

tion for a writ of certiorari in *Harris* v. *Ross*, No. 76-1234, filed March 4, 1977. For the reasons stated in that petition, a copy of which we are furnishing to counsel for respondent, this case also warrants review.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] ~~See the *Underwood* stay application, p. 10 n. 8, p. 12.~~ This case, unlike *Harris* v. *Ross*, *supra*, involves retroactive payments. Accordingly, it may be appropriate for the Court to grant both petitions in order to hear the two cases together.